Central Law Journal.

ST. LOUIS, MO., FEBRUARY 25, 1910

FEDERAL INDEPENDENCE IN THE INTERPRETATION OF STATE LAW.

Justice Stephen J. Field, in the case of Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, lamented his yielding for years, without protest, to the assertion by federal courts of their right to exercise an independent judgment respecting state law. He predicted, that such claim was an error which would yet "die amidst its worshippers."

Lawyers have seen that such judges as Miller and Campbell have revolted at extensions of Swift v. Tyson, but they have not heretofore seen a minority of more than one, at a time, assail the principle of federal independence of state decision. The furthest the federal supreme court has gone since Judge Story wrote the opinion in Swift v. Tyson, 16 Pet. 1, in the way of an unqualified statement regarding surrender of its own views, is, that it will do this as to settled decision on statute law and rules of property in the construction of the common law.

The case of Kuhn v. Fairmont Coal Co., 30 Sup. Ct. 140, is unprecedented in its exhibition of as many as three members of the court dissenting from a single decision, that the federal courts are not bound by a prior decision of a state supreme court in respect to a contract right under a lease antedating such decision.

We made some comment on this case in 70 Cent. L. J. 129, but up to that time we had only read the prevailing opinion, which came to us unaccompanied by the dissent. We confess our surprise now to learn there was the latter, and the strong support it received. It is from the pen of Mr. Justice Holmes, and is concurred in by Justices White and McKenna.

We think this a somewhat memorable event in the history of the court, and we wonder if it is the first step toward the realization of Justice Field's prediction.

This dissent is not as fierce an onslaught on the principle of independence as was that of Justice Field, but in some respects it is more significant. The vigor of language adopted by Justice Field seemed an implied acknowledgment that the doctrine was firmly intrenched. The more dispassionate utterances of Justice Holmes imply that the doctrine has reached high water mark, and a recession may be expected, if it has not already begun.

The latter justice, after showing that the attempted justification of Swift v. Tyson could not rest on the claim, that a federal court, like a state court, merely declared the law of a state, because the former court has so often held that state decisions "*make the law* for a state," then attacks the theory that federal courts are only bound by "settled decision." He says: "It is obviously most undesirable for the courts of the United States to appear as interjecting an occasional arbitrary exception to a rule that in every other case prevails. I never yet have heard a statement of any reason justifying the power, and I find it hard to imagine one. * * * I know of no authority in this court to say that, in general, state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years. * * * It is said that we must exercise our independent judgment, but as to what? Surely, as to the law of the states. Whence does that law issue? Certainly not from us. But it does issue, and has been recognized by this court as issuing from the state courts as well as the state legislatures. When we know what the source of the law has said that it shall be, our authority is at an end. The law of a state does not become something outside of the state court and independent of it, by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else. * * * It is admitted, we are bound by a settled course of decisions, irespective of contract,

because they make the law. I see no reason why we are less bound by a single one."

Justice Holmes was for years on a state bench. We doubt whether there is a single state judge, who would dissent from this reasoning. We feel sure, that it is so imposing in clearness of logic, that some eminent defender of the claim of federal independence in this respect ought to be glad to supply the missing reason to which Justice Holmes alludes.

The claim in every decision allowing it has been based on bald assertion and enforced by arbitrary power. More than that. It has been enforced in favor of a class, to which the constitution has extended but a single privilege—the privilege of escape from the possibility of local or sectional prejudice.

Behold by another decision handed down by the same court, on the same day, how this mere privilege of escape from supposed local prejudice in a trial may extend even to absolving from any trial at all! Mechanical Appliance Co. v. Castleman, 30 Sup. Ct. 125.

This case shows, that a circuit court of Missouri obtained jurisdiction, according to *"settled decision,"* of a defendant by a sheriff's return, held to be indisputable. The case was removed, and the federal circuit court allowed this return to be disputed. Upon the facts, it was held there was no jurisdiction. This holding was affirmed. Who will undertake to say, that protection against local prejudice in a trial ought, by any stretch of construction, to be thought to extend to release from all trial?

This independence doctrine asserted by the federal supreme court is the most distinctly un-American product of our national system. It is not only that, but it is undignified and unjust. It is undignified, because our great tribunal concedes, that state courts by their decisions make the law, and federal courts, merely deciding cases, refuse to obey what they concede to be law. It is unjust, because, by their course of action, federal courts give exemptions to aliens and non-residents, which are denied to residents.

Results of this kind ought to be defended by some clear arguments to meet the kind of argument Judge Holmes advances. Bald assertion is unsatisfactory—especially when made by a court merely exercising a casual jurisdiction, however eminent its place or hoary its practice.

NOTES OF IMPORTANT DECISIONS.

LIBEL AND SLANDER—QUANTUM OF PROOF TO SUSTAIN JUSTIFICATION IN ACCUSATION OF PERJURY.—The Tennessee Supreme Court, in noticing the statutory rule that perjury can be established only by the testimony of two witnesses, or that of one witness and strong corroborating circumstances, holds that this requirement only affects a plea of justification, in a civil action, as to form of proof, but does not touch the general rule, that the burden of affirmative proof is satisfied by a preponderance of the evidence. Trial court was reversed. Lay v. Linke, 123 S. W. 746.

The principal difficulty the Tennessee court labored with was the confusion existing in former decision arising out of a dictum thread running through the warp and woof of Tennessee decision. When it had drawn that from the good fibre, it heartily approved the following proposition stated by Wigmore on Evidence, Sec. 2498: "But the chief topic of controversy has been whether in certain civil cases the measure of persuasion for crim'nal cases should be applied. Policy suggests that the latter test should be strictly confined to its original field, and that there ought to be no attempts to employ it in any civil case. Nevertheless, an effort has been made (though usually without success) to introduce it in certain sorts of civil cases when an analogy seems to obtain. It is sometimes said that, in general, where in a civil case a criminal act is charged as a part of the case, the rule for criminal cases should apply; but this has been generally repudiated." To the same effect is Newell on Slander and Defamation, p. 746.

The general rule alluded to by Prof. Wigmore seems nearly, if not quite well settled. Not altogether unlike this question is that we discussed under the title "The Rule of Evidence Under the Federal Employers' Liability Act," 69 Cent. L. J. 277, where the question is for recovery of a penalty, the distinction turning, as we thought, on whether or not the action

was under a law strictly penal, or penal and remedial.

We trust we may not seem to be riding a hobby too hard, if we refer to this Tennessee case as a strong illustration of what we have been lately urging about the evil of dictum. 70 Cent. L. J. 49, 61, 73.

Some three generations ago a dictum obtruded itself in a Tennessee opinion to the effect that it was necessary to establish justification in an accusation of perjury beyond a reasonable doubt, and several dictum approvals followed in later cases—one case recognizing it as valid, but refusing to apply it because the accusation was not perjury. Now the wraith's accustomed walk has been banished from the judicial corridors of Tennessee forever.

HIGHWAYS—USE OF SAME FOR ADVERTISEMENTS CALCULATED TO FRIGHTEN HORSES.—We endeavored in 69 Cent. L. J. 360, to show the trend of decision with reference to automobiles on public highways, and now we present a late case from Texas Court of Civil Appeals distinguishing the case of one using flaming advertisements on horses and vehicles from that of running an automobile on a street, though it be granted that both uses are calculated to frighten other horses and cause them to run away and cause injury. Patton-Worsham Drug Co. v. Drennon, 123 S. W. 704.

The court thus speaks, and the date of the delivery of the opinion (Dec. 1, 1909), and what it contains, shows that our President has left at least one enduring record of his swing around the circle.

"Though streets are sometimes used for purposes of advertising, they were never intended or designed for such purposes, and, when so used by anyone, he is, if not absolutely liable for any injury that may be caused by such uses, at least liable for any damage that might be reasonably anticipated to flow from it. The public can no more be deprived of its right to the free and unincumbered use of its thoroughfares by the flaunting of banners, the flapping of gaudy caparisons, the display of pyrotechnics, the blare of trumpets, the spirit-stirring drum, the ear-piercing fife and all quality that gladdens the eye, quickens the step and thrills the soul of the small boy, than the people can be of their liberties by the gleaming of scepters, crowns and crescents, or by lawless acts of secret service men who go before a president in his triumphant peregrinations through a great republic. Cases arising from such unwonted use of public highways bear no analogy to those wherein liability has been sought to be fastened upon persons using vehicles which from their appearance or mode of propulsion may frighten horses, for travelers are not confined to the use of horses and ordinary carriages upon highways."

The bilious writer of the above might be suspected of two things—one, that he is old-fashioned in his notions about liberty, and the other that he is new-fashioned in the ownership of an automobile. He goes on further to say: "In the one class of cases, the things calculated to frighten horses, are carried along the street for purposes it was never intended a highway should be used, and such use of it is in the nature of a trespass upon the rights of those in the legitimate use of a thoroughfare. In the other, the use of the vehicles, though of modern contrivance and propelled by new motor power, is legitimate, and such as for which the highway was designed and maintained.

When the Judge further adds in reference to flamingly-lettered sheets, clothing horses, as in the days of knight-errantry palfreys and warhorses were loaded with trappings, the following, that if the "sheets" were being carried merely in transporting, like other property, the owner was still bound to use "reasonable means to prevent injury to others," he seems to agree with what we understand to be the weight of authority in regard to automobiles. The users of these must take notice that they are calculated to frighten horses and govern themselves accordingly.

COMMENTS OF FEDERAL JUDGES IN JURY TRIALS.

The right of a federal judge to express his opinion and comment in the presence of the jury upon the weight and sufficiency of the evidence which it is the duty of the jury to determine is too firmly fixed to be questioned. Those who perceive a menace in the increasing power of our courts may deprecate this; they cannot dispute its legality.

Therefore, the argument that a jury hangs upon a judge's lightest utterance, eager to learn and make his ideas their own; that a judge may thus adroitly, or unconsciously, mould verdicts; that appeal to a higher tribunal upon such grounds is frequently useless from inability to lay before the reviewing court the very tone, inflection and emphasis employed by the judge which give to his words a meaning not discernible from the printed record; that a restraint is unjustly imposed upon the

views and efforts of the advocate, who will seldom venture to throw himself openly into a conflict with the court; and other reasoning against the rule itself, are proper to submit to the legislature, but not to the bench.

One in search of something to be presented against the doctrine need not go beyond the United States Supreme Court Reports. Mr. Justice Daniel, in 1851, recorded an emphatic but futile protest against it.[1] The rule applies in either civil or criminal cases.[2] It is not controlled by the statute of the state forbidding judges to express any opinion upon the facts.[3] Nor can a state constitutional provision affect it.[4]

With all its imperfections, trial by jury is the best method thus far devised for the judicial determination of facts, it is still a constitutional right and any encroachment upon it is justly resented. Herein lies the test of the rule under consideration, for although the judge may express himself upon the evidence, he may not trespass upon the ancient and peculiar province of the jurors. They must be left absolutely untrammeled in their own duty and must so understand themselves to be.

Sir Matthew Hale was merely voicing a self-evident truth in declaring:[5] "If the judge's opinion must rule the verdict, the trial by jury would be useless," and Mr. Justice Harlan likewise, some two hundred years later, in saying that the functions of the court to expound the law and of the jury to apply the law "cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights."[6]

Each case of this sort must undoubtedly be determined upon its own distinct facts, but the criterion is whether or not there is any interference with a free and independent determination by the jury. Along with the ever qualifying essential that no proposition of law must be incorrectly stated, may be collected from the adjudicated cases the following exceptions to the rule, which are concurrent with the rule itself and narrow it more than is commonly supposed: First, The judge must not mis-state the evidence actually adduced; Second, The comments must not take the form of animated argument; Third, The comments must not be one-sided; Fourth, The law and the fact must be separated, and the jury must be left wholly free to determine the facts and all the facts.

1. The first of these is so palpably true that it can never be questioned so long as judgments depend upon evidence adduced in courts. To allow a judge to make reference to something outside the record would, of course, confer upon him the unheard of power of an unsworn and uncross-examined witness, confined only within the bounds of his own caprice. No one would urge such a proposition, nor would any court listen to it, if presented. The error, however, is sometimes fallen into, although not as frequently as the equally censured assumption by the court of facts not proved in charging upon the law.

One of the cogent arguments against permitting any comments at all is that, too often, the jury is of the belief that the judge is apprised of facts not brought forth which guide him to a juster conclusion than they can hope to reach from the strict evidence before them. Our present chief justice has carried the definition a little further, so that not only are comments and opinions upon matters not in evidence forbidden, but "deductions and theories not warranted by the evidence should be studiously avoided," as "they can hardly fail to mislead the jury and work injustice."[7]

2. That the remarks of the court ought not partake of the nature of argument is equally clear. Each party to the controversy may argue, but the judge, if he deems comments necessary, should restrict himself to a summing up of the salient features of the case without entering the realm of ad-

(1) Mitchell v. Harmony, 54 U. S. 115, 137.
(2) Simmons v. U. S., 142 U. S. 148, 155.
(3) Vicksburg R. R. Co. v. Putnam, 118 U. S. 545, 553.
(4) St. Louis Ry. v. Vickers, 122 U. S. 360.
(5) 2 Hal. P. C. 313.
(6) Sparf v. U. S., 156 U. S. 51, 106.
(7) Starr v. U. S., 153 U. S. 614, 626.

vocacy. The judge, from intimate acquaintance and continuous experience, is deemed more capable of winnowing the evidence and thus aiding the jury to arrive at a just conclusion. "A judge," says Hook, J., in Rudd v. U. S.,[8] "should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit, should see that justice is done." But, in the words of Chief Justice Fuller, in Allison v. U. S.,[9] "where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor, that the jury are left without proper instructions; their appropriate province of dealing with the facts invaded; and errors intervene which the pursuit of a different course would have avoided." Even the most conscientious and careful of judges may sometimes overstep the line, and, of course, the effect upon the jury would not be lessened because done inadvertently. An innocent motive would not prevent the mischief. So long as the judge may express his opinion, it would seem he may, to a reasonable extent, give his reasons therefor, but there is a line between this and argument which ought not be crossed.

3. The third exception, that the remarks must not be one-sided would appear too axiomatic ever to be actually violated, and yet the United States Supreme Court had occasion to reiterate this and condemn the occurrence three times within the period of two years,[10] and these were cases where men were on trial for their lives. In two of the cases just cited the reviewing court borrowed the language found in Burke v. Maxwell,[11] that "when there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be so given as not to mislead, and especially that it should not be one-sided."

It is not required that the judge sum up all the evidence, or even all bearing upon a single question,[12] although in England, from whence the practice is derived, we find in Blackstone's day the practice to be: "When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel and all others, sums up the *whole* to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence."[13] To strike the golden mean between the freedom from mentioning all the evidence and the restriction against a one-sided dissertation, would seem, at times, enough to embarrass even the most discriminating jurist who feels called upon to make comments.

4. The requirement that the law and fact must be separated and the jury left wholly free to determine the facts, creates the greatest difficulties. Here the adage that circumstances alter cases is pertinent, if ever. The particular circumstance must always be inquired into and no precedent can be relied upon as controlling. We are told that all matters of fact must be submitted ultimately to the determination of the jury.[14] If every case was as clear in principle as Post v. U. S.,[15] the matter could be easily resolved. There Mrs. Post offered evidence in support of her defense that she could "send by emanations from her own mind such power as will, after passing through the mind of a second person, influence the physical condition of a third person." The trial court told the

(8) 173 Fed. at 914.

(9) 160 U. S. 203, 212, 217.

(10) Starr v. U. S. 153 U. S. 614, 626; Hickory v. U. S., 160 U. S. 408, 422, and Allison v. U. S., 160 U. S. 203, 217.

(11) 81 Penn. St. 139, 153.

(12) Allis v. U. S., 155 U. S. 117, 124.

(13) Bl. Book III.* 375.

(14) Vicksburg R. R. Co. v. Putnam, 118 U. S. 545, 553; Lovejoy v. U. S., 128 U. S. 171, 173.

(15) 135 Fed. 1.

jury that such testimony itself is directly contrary and in opposition to the well-established laws of nature accepted by all men from the experience and study of ages and might be properly ignored without contradiction; but the upper court said the jury should not be peremptorily instructed to ignore any legal and relevant evidence which is admitted, although if such greatly taxes the credulity of the judge, or if he totally disbelieves it, he may say so, leaving the jury free to believe it or not.

A somewhat analogous instance arose in Rudd v. U. S.,[16] where Rudd was convicted for misuse of the mails in selling, or attempting to sell, patent rights for a machine represented to operate contrary to well-known fundamental physical laws. The trial court by remarks "undoubtedly impressed upon the jury that no one with the slightest degree of intelligence above insanity could believe the machine was practicable," so that the jury might have believed that a finding for defendant would subject them to ridicule, and this was held reversible error because it left no room for the probability that the accused had been laboring under his own self-deception.

Another striking illustration of direct interference with the jury, and, although not strictly speaking a comment, yet unmistakable indication of the court's opinion, is found in Glover v. U. S.,[17] where the court took a witness in hand and catechised him in a manner clearly to insinuate that he was untruthful. Judge Phillips says of this that "it bears on its face its own comment."

If the trial judge should say "the evidence seems to prove" certain facts, this is such an expression of opinion as will reverse the case, unless the jury is told it is not bound by such opinion.[18] If the jury be told that the evidence is all on one side, it is equivalent to an explicit direction to find accordingly and fatally erroneous.[19] In the case of Reynolds v. U. S.,[20] the trial court, in a guarded manner, spoke of the evil consequences of polygamy and, upon review, it was held that this was but calling attention to the peculiar character of a crime for which the accused was on trial and reminding the jury of the duty they had to perform, and therefore permissible. Yet in a criminal case the judge should not go so far as to say that in his opinion it is the duty of the jury to convict the defendant, for this is calculated to mislead and might be taken by the jury as a direction.[21] For, in a criminal case, even though the facts are admitted beyond dispute and the question of guilt or innocence depends wholly upon a question of law which the court must decide, yet the court cannot direct a verdict of guilty.[22]

We are further told that there must be no confusion of law with facts, and it is not always apparent whether or not in a given case the jury has been given unrestrained freedom with the facts. It is not sufficient that the judge tell the jury in so many words that they are the sole judges of the fact and are not bound by his comments. The context of the charge and all the comments must be scrutinized as a whole for one part may modify or destroy another.[23] In Burke v. Maxwell,[24] from which the supreme court quotes, the judge told the jury in the clearest possible language that they were not bound at all by anything he said, that possibly he had mistaken the whole matter, and they were the exclusive judges of it, yet the reviewing court, although expressing its belief that the trial judge intended to do exact justice, said that he unwittingly overstepped the line, and that the charge, "so far from being a calm, impartial presentation of the evidence, some portions of it, at least, went far beyond the evidence," and that deductions and theories were drawn, which, if not wholly unsupported, should have been left for the jury.

(16) 173 Fed. 912.
(17) 147 Fed. 426, 429.
(18) Anderson v. Avis, 62 Fed. 227, 230.
(19) Nyback v. Champagne Lumber Co., 109 Fed. 732, 737.
(20) 98 U. S. 145, 168.
(21) Breese v. U. S., 108 Fed. 804.
(22) U. S. v. Taylor, 11 Fed. 470, 474; Sparf v. U. S., 156 U. S. 51, 105.
(23) Fidelity Mut. Ass'n. v. Miller, 92 Fed. 63, 70.
(24) Supra.

In Hickory v. U. S.,[25] where it is said[26] the charge "violates every rule thus announced," the judge repeatedly interspersed his comments with, "You are to take into account this fact," "All these things are facts that you must take into account," "You have a right to take that fact into consideration," "And there is another fact that is so common that I have but to remind you of it because that which makes up your common knowledge you can use in the investigation of these cases," and "This concealment of the evidence of crime has been regarded by the law as a proper fact to be taken into consideration as evidence of guilt, as going to show guilt," etc. Again, for example, the trial judge in Starr v. U. S.,[27] in the midst of comments (vituperative, it must be admitted), said: "If it be true that you are satisfied beyond a reasonable doubt that Floyd Wilson was a man of this kind . . . your solemn duty would be to say he (Starr) is guilty." And so in the Rudd case, supra, after the extended remarks which made the jury feel it would be ridiculous to acquit, the trial court withdrew the language and said that "it does not follow that a man is a fool or insane who believes the representations" and that it was a question for the jury.

In the Pennsylvania, Hickory and Starr cases, as well as the more recent Rudd case, will be seen express recognition in the trial court's charge of the jury's province to pass upon facts, and yet the court's comments were held to have resulted in imperfect trials. There can be, therefore, such a commingling of law with fact, or overshadowing emphasis or argument upon the facts, as to overcome the positive and correct instruction to the jury of its rights and duties. Whether or not a trial judge has interfered with the independence of the jury is itself a question of fact.

HARRY B. TEDROW.

Denver, Colo.

(25) 160 U. S. 408.
(26) pp. 422-3.
(27) 153 U. S. at 627.

PARTNERSHIP—REAL ESTATE IN DESCENT AND DISTRIBUTION.

SCHLEISSNER v. GOLDSTICKER.

Supreme Court of New York, Appellate Division, First Department, December 30, 1909.

In the absence of any agreement, express or implied, between partners to the contrary, partnership real estate retains its character as real estate between the partners and between a surviving partner and the representatives of a deceased partner.

HOUGHTON, J.: After the defendants had interposed an answer to the plaintiff's complaint, they moved for judgment in their behalf under section 547 of the Code of Civil Procedure. The learned Special Term denied the motion on the ground that on a motion under the provisions of that section of the Code the insufficiency of the complaint could not be tested. As the provisions of that section have been interpreted by this court such view is erroneous. By our decisions we have said that section 547 of the Code permitted, in effect, a trial of the action upon the pleadings, and that on a motion made thereunder the sufficiency of the complaint could be tested as well as the insufficiency of a defense. Jones v. Gould, 130 App. Div. 451, 114 N. Y. Supp. 956; Milliken v. Fidelity & Deposit Co. of Maryland, 129 App. Div. 206, 113 N. Y. Supp. 809; Searle v. Halstead & Co., 130 App. Div. 693, 115 N. Y. Supp. 405; Levy v. Roosevelt, 131 App. Div. 8, 115 N. Y. Supp. 475; Crimmins v. Carlyle Realty Co., 132 App. Div. 664, 117 N. Y. Supp. 434; Ship v. Fridenberg, 132 App. Div. 782, 117 N. Y. Supp. 599. The learned Special Term in examining these decisions, of which he was aware, was of opinion that the precise point had never been raised, and as reported they do not disclose that it had been. In making our decisions, however, this court has in fact considered the question, and concluded that of necessity the complaint as well as the answer must be searched in determining whether or not a motion for judgment on the pleadings should or should not be granted.

The section permits a party to a litigation, after issue has been joined and each has al-

leged by way of complaint or defense what he deems inadvisable, to test the right of either to judgment on the pleadings by motion, without waiting for the cause to be reached upon the trial calendar, and we have held that such procedure is analogous to a motion at the opening of the trial. Clark v. Levy, 130 App. Div. 389, 114 N. Y. Supp. 890. The court has established a practice on such motion analogous to that upon demurrer, and in a proper case have held that a party whose pleading has been found insufficient should be permitted upon proper terms to amend.

The appellants insist that, had the sufficiency of the complaint been tested, it would have been found insufficient. We think not. The action is for the partition of real property alleged to have been purchased by a copartnership. One of the partners, through whom the plaintiff claims, died, thus terminating the partnership, and the complaint avers that all partnership debts have been paid in full except mortgages on the real estate in question. The title to at least one of the parcels described stood in the name of all three partners. The business of the partnership is not disclosed, but it does not appear that that business consisted of buying and selling real estate, and it cannot be assumed that the partnership business was of such a character. In the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty, with all the incidents of that species of property between the partners themselves and also between a surviving partner and the representatives of a deceased partner. Darrow v. Calkins, 154 N. Y. 503, 44 N. E. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637.

Notwithstanding the express holding of the above decision, the appellants insist that the complaint falls within the later case of Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913. In this latter case the partnership was formal for the purpose of dealing in real estate, and it was held that, the real estate being the merchandise in which the co-partnership traded, the acts of the parties showed an intention to convert the realty into personalty, and that there was of necessity an implied agreement that it be so treated. For aught that appears in the present complaint, the real property sought to be partitioned may have been purchased as an investment from the surplus earnings of the co-partnership. In such a case it would retain its character of realty and be subject to partition if the partnership obligations had been satisfied without resorting to it.

Without passing upon the question as to whether a partition action is proper where title was not vested in all of the partners, but only in one or more for the benefit of the others, the present complaint states a good cause of action, for, as above indicated, the allegation is that as to one of the parcels the title was in all three of the partners. The partnership obligations having been satisfied as to this parcel, at least the heir or devisee of the deceased partner could maintain an action in partition.

It follows, therefore, that the learned Special Term, although the reason which he gave was untenable, properly refused to grant judgment in favor of the defendants dismissing plaintiff's complaint.

The order should, therefore, be affirmed, with $10 costs and disbursements. All concur.

NOTE—*The English and American Rule as to Partnership Assets in Land.*—The case of Darrow v. Calkins, supra, discusses very thoroughly the English rule to the effect that not only is real estate to be regarded as personal property by the partners *inter sese*, but it continues so for every other purpose in a property sense, or at least so far as any interest therein is concerned. Of course, we speak only as to parties and privies and those who are concerned with respect to a partnership. This case thus speaks of the English rule: "The English rule, after many fluctuations, has, as we understand the cases, come to be, that lands purchased by a partnership with partnership funds, whether purchased for or used for partnership purposes or not, provided only they were intended by the partners to constitute a part of the partnership property, become *ipso facto*, in the view of a court of equity, converted into personalty for all purposes—as well for the adjustment of the partnership debts and the claims of the partners *inter se*, as for the purpose of determining the succession as between the personal representatives of a deceased partner and an heir-at-law. Darby v. Darby, 3 Drew. 495; Essex v. Essex, 20 Beav. 442; Lindley, Partn. 3d Ed., 681 et. seq." The opinion, further on, says: "The general doctrine of 'out and out' conversion adopted by the English courts has not been followed to its full extent in this and many other American states. There is no policy growing out of our laws of inheritance or the exemption of lands from liability for simple contract debts, which requires the application of such a doctrine here. The lands of the ancestor are as-

sets for the payment of all debts and the persons who take by descent and under the statute of distribution are substantially the same. The necessity for an absolute conversion, supposed to be found in the nature of a partnership interest seems hardly sufficient to justify a fiction which would deprive real estate of a partnership of its descendible quality when it is admitted on all hands that real estate, if the necessity arises, is first subject to be appropriated in equity to the discharge of all partnership obligations and the adjustment of the equities between the parties."

The American theory of a qualified conversion into personalty, i. e., placing real estate of a partnership on the footing of personalty to subject it to partnership obligations and to equities between the partners, extends to a disregard of the form of the legal title, that is whether it runs to a firm or one or more members thereof. Shanks v. Klein, 104 U. S. 18.

The American doctrine, also, has been held to mean, that this subjecting all assets alike to the necessities of the partnership may prevent their character as realty or personalty being determined as of the date of the death of one of the partners. Thus in Coolidge v. Burke, 69 Ark. 237, 62 S. W. 253, the facts show, that a firm owned a mortgage, which was declared by the court as being but a security for debt to be a chose in action and therefore personalty. One partner dying, the other held the assets as trustee for the sole purpose of winding up the partnership business. "As such, it was his right as well as his duty, to gather in and make available all the assets of the firm for satisfying firm creditors, adjusting partnership equities, and then hold the residue for distribution to those entitled thereto." Then the court declaring that everything for these purposes was personalty, also said: "The surviving partner had the unlimited power and right, so long as he acted in good faith, to change the form of assets from personalty to realty and the reverse. That is, he had the right of conversion." Administering these assets this chose in action was converted into land. "Before the affairs of the partnership were concluded, that which was personalty by rightful process of conversion had become partnership realty, and it so remained until the time for distribution."

This chose in action having been thus converted was disposed of, in distribution, as realty. The logic of this holding was lately applied by the Arkansas court in the case of French v. Vanatta, 104 S. W. 141, in holding that the heirs of a deceased partner, were not necessary parties in an application by surviving partners to sell partnership property, as "there is no individual property until partnership property is at an end, which does not occur until its debts are paid, its affairs are closed and the residue of assets distributed."

In Kentucky the English doctrine has been ruled to obtain. See Cornwall v. Cornwall, 69 Ky. (6 Bush) 369, and Bank of Louisville v. Hall, 71 Ky. (8 Bush) 1. c. 678, in reaffirmance. The former case cites all the English authority and then observes: "There is much conflicting dictum and some contrariety of judicial determination among American courts, and it may still be said, as in a note to section 94, p. 164, of the 6th Edition of Story on Partnership, by Gray, issued in 1868, that on the whole the law does not seem to have advanced much beyond its condition when the author declared it open to many distressing doubts." The court then concludes that the safe and reliable rule is for an "out and out" conversion. The Vermont rule seems in accord with this case. Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54.

But a great majority of the states are against the English rule and seem to differ only, as to when the character shall be determined. In Georgia a surviving partner cannot convey title to land. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679. The rule would seem to be the same in Tennessee, or at least the title in realty vests in the heir at the decease of the ancestor, but any rents accruing while the surviving partner holds possession for partnership purposes are personal property, and if it is necessary to sell the realty the surplus vests in the heir. Griffey v. Northcut, 52 Tenn. (5 Heisk) 746.

Many cases go on the theory expressed in the Coolidge case *supra*. See Wilcox v. Wilcox, 95 Mass. (13 Allen) 252; Campbell v. Campbell, 30 N. J. Eq. (3 Stew.) 415; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Appeal of Leaf, 105 Pa. 505.

While the English courts may have evolved this personalty theory, because of primogeniture and entail, yet there might be advanced something in the way of reasoning for its application here, because of our dower statutes giving rights of dower in realty of which the husband was seized during coverture, but American decision does not apparently concede this. See Dickey v. Shirk, 128 Ind. 278; Woodward-Holmes Co. v. Mudd, 58 Minn. 236, 49 Am. St. Rep. 503. Her claim is likewise one that is subject to claims of creditors and equities of the other partners, and, presumptively, to the surviving partner's right of conversion according to the necessities of a partnership's affairs. See Hunnicutt v. Summey, 63 Ga. 586; Blossom v. Van Aminge, 63 N. C. 65. Dower, then, may be said to be but an incident in the way of an exception to the general policy of our law as stated in the Darrow case *supra*.

An exception to real estate in partnership being such has been made in the case of a partnership dealing in real estate as its stock in trade. Thus, in New Jersey it was held that what we have said was the American rule did not apply "where the only business is the dealing in real estate and the original contract contemplated and required its sale during and at the end of the partnership business. Patrick v. Patrick (N. J. Ch.), 63 Atl. 848. And such seems the case in 188 N. Y., referred to in the principal case, but the decision there was careful to confine itself to the facts saying: "We agree that a conversion should not be adjudged as between the heirs and personal representatives except upon evidence clearly warranting such a determination and that it would be unsafe and unsatisfactory to base such a determination upon a mere oral agreement made many years ago." Then the court finds a distinct purpose on the part of the partners that the realty should be deemed personalty. We think, even that is a doubtful rule. If realty is realty there ought to be something more than intention to make it personalty. It is enough under the American rule to distribute property in the form it stands when the partnership is wound up. That is a rule with certainty about it.

C.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Principal and Surety—Liability of Surety After Release of Principal Debtor.—A surety is not discharged by the release of the principal debtor if he has expressly bound himself by the instrument creating the suretyship to continue liable.

The plaintiff mortgaged certain properties to the defendant bank to secure all moneys for the time being due on the overdraft of Perry Bros., a firm consisting of his two sons. The mortgages were in the usual banker's form, containing a clause that the bank should be at liberty without thereby affecting their rights under the mortgage "to determine or vary any credit to the debtors or any of them, to vary, exchange, or release any other securities held or to be held by the bank for or on account of the moneys hereby secured or any part thereof, to renew bills or promissory notes in any manner, and to compound with, give time for payment of, and accept compositions from and make any arrangement with the debtors or any of them." Perry Bros. got into financial difficulties, and, there being several bankruptcy petitions pending against them, they called a meeting of their creditors, at which a scheme was accepted that a company should be formed to take over all the properties owned by Perry Bros., and issue to the creditors in satisfaction of their debts debenture stock to the amount of their debts plus 25 per cent. Perry v. National Provincial Bank of England, C. of A., Jan., 1910.

Cozens-Hardy, M. R., said that the case was a curious one. It arose out of the law of principal and surety, and it was important to distinguish clearly between the rights under an ordinary contract of suretyship not containing special provisions and the rights of a surety when the instrument creating the suretyship contained special clauses. In what might be called the simple case, a surety was discharged if, for example, a creditor gave time to his principal debtor, and a fortiori if a creditor released his principal debtor the surety was released too. There were many other acts which might release the surety if there was no reservation of rights against him, but if in the instrument of suretyship there was a provision that the surety should continue liable notwithstanding the doing of any act, all these doctrines had no application at all.

ENGLISH NOTES.

"It can hardly be said that the majority of Englishmen are wholly satisfied with the administration of the law of libel in this country. The verdicts of juries appear sometimes to be irrational, and the boundaries of the law relating to privileged communications and fair comment have not been ascertained with precision. Things, however, are much worse on the other side of the Atlantic. Judge Gaynor, the Mayor-elect of New York, took occasion, the other day, at a dinner given in his honor by lawyers of different counties forming the state, to complain of the low estate to which the law of libel had sunk of late years, and said that it would depend upon him whether it remained so or not. He hoped that the publication of private letters which was now going on would not continue under his administration. The law of libel in New York was the same as the law in England, but in New York there was no enforcement of the law. A statute had long been in force in the state which made it a crime to publish any letter or private paper of another person without his consent, but this enactment was wholly disregarded with no interference on the part of the public prosecutor. His own house had been entered in the night-time; his desk and papers ransacked, and a garbled copy of a letter received by him was publishd in one of the newspapers. Judge Gaynor's observations are explained by the conditions affecting the newspaper press of the United States. A craze for great circulation, no matter among what classes, as the only evidence of success and the only way to make the sale of the newspaper a source of profit, is widely prevalent. American papers have always been more strongly personal than English journals. Many of them give their views and opinions without restraint, and the libel laws are apparently resorted to less by people who have character to protect than by those who are tempted to make an inadvertent error the foundation of an action. It is rumored, however, that some change may be expected in the character of the American newspaper press." Solicitor's Journal, Vol. LIV, p. 75.

A quaint case came before Mr. Justice Eve on the present sittings (Re Charlesworth). The Rev. E. G. Charlesworth, for very many years a member of the Cleveland Clerical Society, in the diocese of Durham, the members of which meet quarterly at 11 a. m. to discuss the religious welfare of the district, who had seen that the expense of providing themselves with a mid-day meal away from their homes after these quarterly meetings prevented clergymen living in the remoter parts of the district from attending the meetings, bequeathed a sum of stock to the society, upon trust to apply the dividends in paying the costs of this meal, instead of the clergymen paying such cost out of their own pockets; and the question arose whether, notwithstanding that the society was a charity, the destination of the income was really charitable, so as to avoid falling within the rule against perpetuities. It was argued in favor of the bequest that it was equivalent to a gift to the society on condition that they altered their arrangements in such manner as to give the mid-day meal free so far as the dividends would extend; that a perpetuity within the limits of a charity was not illegal; and that the effect of the gift was to increase the benefits conferred upon the community by the society by ensuring a larger attendance of the clergy. On the other hand, it was contended that this would be illegal as a bribe to the clergy to attend; that the bequest was not in substance a gift to the society but a trust for a purpose outside its objects; and that providing meals was not a charitable bequest, as there was nothing to confine the benefits to the poorer clergy. Mr. Justice Eve, after remarking incidentally that the inducement to attend created by the bequest was perfectly justifiable, having regard to the natural craving for food at the time the meetings ended, said that the gift promoted the objects of the society, and that the attendance of the wealthier clergy to give their experience and advice might be just as useful as that of their poorer brethren, and decided that the gift was a good gift for a charitable religious ob-

ject. All we can add, in the way of legal authority for this decision, is that Lord Stowell's dictum (reported in Boswell's Johnson), that "a dinner lubricates business," may be equally applicable to the prospect of a dinner.—The Solicitor's Journal, Jan. 15, 1910.

JETSAM AND FLOTSAM.

DAMAGES NOT RECOVERABLE FOR INNOCENT INFRINGEMENT OF TRADE MARK.

We have quite recently called attention to decisions of courts in England and Scotland holding that a defendant may be liable for damages for wholly unintentional libel (Jones v. Hulton & Co., L. R., 1909, 2 K. B., 444; affirmed by the House of Lords; Reeves v. Weekly News, see Law Journal, London, December 8, 1909, New York Law Journal, June 11, 1909, January 14, 1910). We expressed disapproval of the doctrine of these decisions, and are glad to see that in a recent English case involving innocent infringement of trade mark the court adhered to a rule which is more consonant with justice and common sense. The substance of such determination is set forth in the following extract from the Solicitors' Journal and Weekly Reporter of January 22, 1910:

"The case of Slazenger v. Spalding (27 R. P. C., 20) is an interesting and important one. The plaintiffs were entitled to two registered trade marks for golf balls. The defendant sold some golf balls which were marked with what was admittedly an infringement of the plaintiff's trade mark, but they did so in ignorance of plaintiff's rights. On the plaintiffs objecting the defendants offered to consent to a perpetual injunction and to pay the proper costs and also to pay 10 pounds sterling in respect of damages (if any); but the plaintiffs refused this offer and brought their action to trial, claiming that they were entitled to either an inquiry as to damages or an account of profits. The defendants relied upon Lord Westbury's judgment in Edleston v. Edleston in 1863 (1 De G. F. & J., 185), where he said: Although it is well founded in reason and also by decision that if A has acquired property in a trade mark, which is afterward adopted and used by B in ignorance of A's right, A is entitled to an injunction, yet he is not entitled to any account of profits or compensation, except in respect of any user by B after he became aware of the prior ownership; and also upon a similar decision in 1880 of Jessel, M.R., in Ellen v. Slack (24 Solicitors' Journal, 290). In the former case the trade mark was, of course, not registered; in the latter case it was. While not questioning the defendant's good faith, the plaintiffs contended that notice of their trade marks was immaterial, but if it was, the register of trade marks was notice, as it was open to public inspection. Neville, J., before whom the action was tried, said that the question was whether the principle of Edleston v. Edleston applied since the passing of the Trade Mark Act, 1905. He held that it did, and that where the infringement of a trade mark is made without knowledge of the existence of the plaintiffs' trade marks, there is not a right to compensation, but only to an injunction. He held that the defendant did not know of the plaintiffs' rights, and that the trade marks' register was not notice to all the world. The plaintiffs, therefore, being wrong in proceeding with their action after the defendants' offer, he only awarded them an injunction, with costs up to the date of their refusal of the offer, and any costs that would be necessarily incurred to obtain an order; the other costs in the action they were ordered to pay. But the learned judge, although holding that the plaintiffs were not entitled to compensation, expressed an opinion that the defendants ought not to withdraw their offer of 10 pounds sterling. The defendants did not claim the right to withdraw this offer—as they clearly might have done—so it was held that the plaintiffs were entitled to the 10 pounds sterling. The principle of the decision—that the plaintiffs were not under the circumstances legally entitled to compensation—appears to us to be right, but the learned judge apparently thought that they were morally entitled to it."

The tendency of American authority would seem to be to support the position taken in the English case. In Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, occurs the following dictum.

"If the plaintiff has the absolute right to the use of a particular word or words as a trade mark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages the further violation of the right of property will nevertheless be restrained."—New York Law Journal.

LOOSE LEAF LAW REPORTS.

The mode of using law reports will be completely revolutionized if the system suggested by Mr. P. T. Carden in the current number of the Law Quarterly Review should be adopted. Briefly, it consists of the abolition of binding for law reports, the printing of each case on separate sheets, and the filing and indexing of the cases so that the report of any particular case can be picked up without difficulty.

Thus there would be no change in the actual reports, or in the pages, except so far as necessary to secure that each case began and ended separately from its neighbors. But the cases, instead of being in bound volumes, would be arranged in drawers of suitable size, and the suggestion is that the arrangement should be in alphabetical order according to the name of the case. Mr. Carden anticipates the question, "What will be gained by unbinding the leaves of the reports and rearranging the order of the cases?" His answer is "Space, time, money and temper." Space is to be gained because the lawyer will refuse to keep a large number of the cases which now fill the bound reports; and at any rate, he will carry into court only the actual cases he intends to cite. The first point is perhaps deceptive. A collection of leading cases is useful enough for the student. To the practicing lawyer it is of doubtful utility, and—even if the publishing difficulties could be got over—it would be a difficult task to make a full collection of useful cases, and to reject others. But for carrying cases into court the system is undoubtedly attractive. A few loose reports would take the place of the many volumes which are required for arguing a difficult case. The system, however, does not stop at the mere unbinding of the reports and the rearrangement of the cases in alphabetical order. In order to use them some machinery for ready

reference is necessary, and Mr. Carden proposes to furnish this by means of index cards. The card, of which he gives a specimen, would contain the case-name—printed on an extension of the card—a short statement of the case, and references to cognate authorities, and would be placed with the case in the drawer so that the name would be visible. But this still leaves it necessary that the lawyer should know the name of the case he wants, and the system requires to be completed by apparatus of the nature of ordinary digests. The details of the scheme must be sought in Mr. Carden's paper.

The Solicitor's Journal (London), in commenting on this suggestion, says: "We are not averse to improvements or to the change which improvements necessitate. If loose leaf law libraries are convenient, doubtless they will come, and instead of pleasing rows of bookshelves we shall look on piles of drawers, suggestive of drugs or deceased butterflies, but really filled with careful selections of judicial wisdom. We have a vision, though, of the lawyer at the end of a busy day of reference, gazing in despair at the debris that the day's work has left in the shape of loose leaves, and we doubt whether they would ever get back to their proper places."

CORRESPONDENCE.

DAMAGES AS COSTS ON APPEAL IN FAVOR OF SUCCESSFUL RESPONDENTS.

Editor Central Law Journal:

I have a client who has a claim against one of the larger railroad companies of this state. There can be no doubt of the justice and reasonableness of the claim, both in law and fact, but the amount involved is so small, that it is not worth paying a heavy attorney's fee. The railroad company has refused to pay the matter, and I am confronted with the question as to what to advise my client. If I advise him to bring suit in the local justice court, the railroad is almost certain to appeal the case to a higher court, and not unlikely to carry the matter to the court of the last resort of the state. To carry it up there will involve upon my client the duty of employing an attorney to represent him, whose reasonable fee would certainly be more than the amount involved, in the event the attorney should charge a fee that is at all proportionate to the labor involved. In all events, my client is likely to wait some time before he receives the money due him.

This condition is by no means unusual, for almost any attorney can relate similar incidents, but it illustrates a condition that I think can be removed by the following remedy:

There should be a statute passed along the following lines, that in the event a party appealed from the judgment of a justice of the peace, and was unsuccessful in the higher court, he should pay as part of the fixed costs of the suit, ten per cent of the amount involved, to be collected as other costs, this should apply to both plaintiff and defendant, and there should be a like rule regarding appeals from courts of record to appellate courts.

It seems to me that such a rule as the above, would tend to discourage frivolous and speculative, as well as vindictive lawsuits, it would have a tendency to discourage those parties who wish to cause the opponent as much trouble as possible, and perhaps discourage the large corporations who have the habit I have mentioned.

It seems to me that the only exception to the rule that would be justified would be, in the case of unliquidated damages, in all other cases if the plaintiff has a just cause which is properly presented to the court, he is entitled to judgment, and should be allowed to secure compensation from the defendant who has caused him to undergo all the annoyance, delay and expense of a lawsuit, instead of compensating him for the injury suffered without the aid of the courts. On the other hand, in the event the plaintiff does not have a just claim, or does not present the matter to the court in the proper manner, he should compensate the defendant whom he has brought into court, and caused to suffer all of the delay, annoyance and expense incident to defending a lawsuit.

The question of the reformation of our courts is one that is being seriously considered by the laity and bar, and I suggest that the course I have indicated will have a beneficial effect.

ROBERT W. GODBEY.

Apache, Okla.

[Note.—The suggestion of our correspondent is not an unwise one. In some features the suggestion has been adopted in other states. Thus North Carolina, Florida and Georgia, have laws that impose a forfeit of fifty or sixty dollars on railroad corporations which unsuccessfully resist certain small claims.

In Arkansas a law has been passed that collection by assignee of any damage claims not exceeding ten dollars might be made from the railroad agent at destination and on refusal, treble damages may be recovered.

These enactments contain a very important suggestion in solving the question of the accumulation of cases on appeal and the multiplication of reports.

Very many cases would not be appealed and go to swell that vast volume of decisions on well settled points of law if the appellants were mulcted heavily in costs if their appeals failed.

We would suggest a minimum extra charge on all appellants of ten dollars to be added to the costs to be paid to the respondent for attorney fees and other expenses and trouble to which he is put by the appeal. In addition, when the amount of the judgment, or in the case of an appeal by the plaintiff the amount asked in the petition exceeds the sum of one hundred dollars the costs on appeal for benefit of the respondent should be ten per cent of such amount, provided that in no case should the sum so recovered exceed one hundred dollars.

Such a law would certainly discourage frivolous appeals. Where a plaintiff or defendant had a good case he would appeal, but where he was only appealing for the sake of delay, he would think seriously before incurring this additional expense.

It has been suggested that such a law should apply only to appeals by defendants, first, because a plaintiff seldom brings a case without sufficiently feeling that there is some merit in it; second, because the burden of all the initial costs of the proceeding are already upon him; and third, because the plaintiff's appeal seldom embarrasses a defendant.

However, we are not committed to any particular suggestion along these lines, but would

be glad to hear from members of the profession in respect to this suggestion.

Editor.]

FOREIGN CORPORATIONS DOING LOCAL BUSINESS.

Edtior Central Law Journal:

We notice that the Supreme Court of the United States has lately decided some important questions growing out of litigation started in the State of Kansas involving the filing of the Articles of Incorporation. The first one decided a few days ago was in favor of the Western Union Telegraph Company and we now notice that the Pullman Palace Car Company has won a favorable decision on the same questions. We hope that you will give the opinion in your valuable journal rendered in the first case, as the questions decided there are attracting considerable attention in some of our northwestern states.

Very truly,

C. W. JOHNSTON.

Des Moines, Ia.

[Note.—We take it that our correspondent refers to the case we discuss in 70 Cent. L. J. 109. Publication of this case in the Supreme Court Reporter will likely appear almost coincidently with the appearance of this number. Mr. Justice Holmes, in his dissent says: "If after this decision the State of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there or from doing local business until it has paid $20,100, I shall be curious to see upon what ground that legislation will be assailed." We think he need not be curious about what Justice White would say on this. All the others would probably say the requirement is enforceable, unless they were persuaded that the exaction is not required in good faith to subserve the interests, welfare and convenience of the people of Kansas. We suppose that the judges, holding the majority view would be very loath to brand the statute of a state in this way. But, if a state should say, naming certain corporations, that this one should pay $20,000, another $15,000, another $10,000, etc., etc., and it could be fairly concluded that the State was merely endeavoring to "whip the devil around the stump" of the supreme court's decision, the performance would bear resemblance to a farce, and, possibly, be so adjudged.—Editor].

BOOK REVIEWS.

MURDOCH'S BUILDING A LAW BUSINESS.

A very odd and yet quite a serviceable booklet appears under the title, "Building a Law Business," by George H. Murdoch. It is a book of suggestions mainly for the commercial lawyer, and treats of various forms of legal advertising. It is a book of ways and means for the ingenious lawyer to rake in the shekels in various legitimate ways. The subject is discussed in six chapters. Chapter I., Introductory; Chap. II., Methods of Advertising in Commercial Use; Chap. III., Law Writing and Compiling; Chap. IV., Organizing a Clientele; Chap. V., Social and Political Activity; Chap. VI., Conduct of Business. The suggestions are all good, although some of the advertising features would hardly be favored by practitioners of the old school. Nevertheless, the young, struggling lawyer often is compelled to smother a little pride in order to get a footing. Later, when business comes easy, he can afford to repent of his early escapades and uphold more strictly the "honor of the profession."

Printed in one small volume of 76 pages and published by the Murdoch Law Book Co., East Orange, N. J.

HUMOR OF THE LAW.

The following answer was recently filed in the State of Washington by a defendant who expressly refused to have anything to do with lawyers:

To Exhibit A.

In the Superior Court of Washington for C———— County.

(Ans. to the Summons.)

—, —, Mc————, Plaintiff.

vs.

C. W.———— B————, Defendant.

For Collection of one Promissory Note given Nov. 11, 1907 A. D., $150.

Due April 15, 1908, Cr. May 20, 1908, $50.

Secured by Chattels, filed November 16th.

Answers:

The the execution should not be allowed prior to Sep. 1908 for the following reasons viz: That said J. R. Mc———— on or about April 13, 1908 mutually agreed to allow note to run till Sep. 1908 at intrests from April 15.

II. That said J—, R—. Mc———— did not demand payment prior to this action.

III. That the defendant voluntary maid payment of one other promissory note of 40$ secured by chattles.

IV. That the defendant also has maid cash payments to the amt. of 50$ which were volentery and have been Cr. on the Note which shows to coroberate that there were an extention of time for payment.

V. That said J—. R—. McD———— and wife have money insavings & deposits therefore are not in need; while the defendant is in stringent financial condition with his sister and her family to support and is at wage working while crops are developing having grown crops on the Mc———— P———— farm that is rented from J—. R—. Mc———— & other assurance given and excepted for rent.

VI. That this action was brought because of spite or grievience caused between house keepers Mrs C———— O———— & Mrs. J—. R—. M—— My sister demanding our Share of and the needed house room That said J—. R. Mc———— has made stringent efforts to compell, or influence the Defendant C—. W———— B———— to grant said Mc———— to freely occupy the premises.

VII. That the defendant offered volentarily a Bill of sale of the chattl securing the notes incumber prior to any action.

Signed C. Wesley Brown

I, C—. W———— B———— have personally written the foregoing instrument as answering the summons why execution should be delayed or not allowed by this complaint.

C— W—. B————

C————, Wash.

Subscribed and sworn to before me this 26th June 1908.

(Signed)

County Clerk.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Accident Insurance**—Failure to Follow Physician's Directions.—No indemnity should be allowed for an insured under an accident policy on account of an extension of the injury occasioned by his negligence to follow directions of his physician.—Maryland Casualty Co. v. Chew, Ark., 122 S. W. 642.

2. **Accord and Satisfaction**—Checks.—A debtor paying by check containing a condition held authorized to withdraw the condition prior to the acceptance of the check by certification.—Drewry-Hughes Co. v. Davis, N. C., 66 S. E. 139.

3.——Conditions.—A debtor paying by check containing a condition held authorized to withdraw the condition prior to the acceptance of the check by certification.—Drewry-Hughes Co. v. Davis, N. C., 66 S. E. 139.

4.——Payment by Check.—The retention of a check which was shown by a letter and voucher which accompanied it to be in full payment of the account sued on, without any explanation, held a payment in full of the account.—Goodloe v. Empson Packing Co., Mo., 122 S. W. 771.

5. **Action**—Splitting Cause of Action.—Each of the wards of a guardian held entitled to maintain a separate action against the guardian's administrators for the recovery of a separate share of the estate, though they had designated themselves as joint claimants in filing their claims with the administrators.—Miller v. Ash, Cal., 105 Pac. 600.

6. **Animals**—Stock Law.—The penalty prescribed by the stock law of May 23, 1901. (Acts 1901, p. 305), for its violation, is not applicable to stock merely running at large.—Rowe v. State, Ark., 122 S. W. 626.

7. **Appeal and Error**—Affirmance.—Where the court affirms a judgment on condition of remittitur of an excess in amount, and judgment has been executed, on failure to restore the excess, the entire judgment will be reversed.—Duval v. Advance Thresher Co., Neb., 123 N. W. 1022.

8.——Restraining Order.—A temporary injunction having been dissolved, and a justice of the Supreme Court, after appeal, having ordered a stay pending appeal, the clerk of the district court must observe the order, though no supersedeas bond was given.—Staples v. Hobbs, Iowa, 123 N. W. 935.

9. **Arbitration and Award**—Submission.—Under Code, sec. 4386, the name of the court in which judgment may be entered, the demands to be submitted, the names of the arbitrators, and the time within which the award must be made may be modified by subsequent stipulation, and all other matters may be changed or omitted in writing or by parol.—Wilkinson v. Pritchard, Iowa, 123 N. W. 964.

10. **Assignments**—Validity.—In a cause of action for personal injury surviving the claimant's death, an assignment by him of an interest therein is valid.—Wells v. Edwards Hotel & City Ry Co., Miss., 50 So. 628.

11. **Attachment**—Claims by Third Persons.—That a constable received a void indemnifying bond executed after service of claim to the attached property by a third person would not waive his right to demand service of a sufficient statutory notice of claim.—McFarlane v. Dick, Iowa, 123 N. W. 1005.

12. **Bankruptcy**—Corporation Subject to Aid.—The conducting by a corporation of a shop for the repairing of automobiles, which repairing consisted chiefly in the adjusting of parts purchased from other persons, was not a manufacturing pursuit, which subjected the corporation to proceedings in bankruptcy.—Cate v. Connell, U. S. C. C. of App., First Circuit, 173 Fed. 445.

13. **Bills and Notes**—Insertion of Date.—A bona-fide holder without notice of a note held entitled to enforce it notwithstanding the fact that the payee inserted an improper date therein.—Bank of Houston v. Day, Mo., 122 S. W. 756.

14.——Sufficiency of Evidence.—In an action on a note shown to have its inception in fraud by an alleged holder in due course, the burden is upon plaintiff to affirmatively establish his good faith in the transaction.—Arndt v. Aylesworth, Iowa, 123 N. W. 1000.

15. **Boundaries**—Proceedings to Establish.—On appeal from a county surveyor's report establishing boundary lines, record of former survey held admissible, though not showing that it was made on notice to all interested parties.—Dent v. Simpson, Kan., 105 Pac. 542.

16. **Brokers**—Duty to Disclose Facts.—Broker sending customer to his principal to negotiate directly, without communicating to the principal his knowledge that the customer was resolved to pay the price asked, held to forfeit any right to commission.—Carter v. Owens, Fla., 50 So. 641.

17. **Carriers of Freight**—Persons who May Sue.—The owner of crates of pears intrusted as a commissionman with other crates, such crates together making up a car, can sue for any damage thereto.—Atlantic Coast Line R. Co. v. Partridge, Fla., 50 So. 634.

18. **Carriers of Passengers**—Injury to Passengers.— A passenger cannot recover for mental suffering incident to an injury in the absence of a showing of wanton or willful disregard of his rights.—Caldwell v. Northern Pac. Ry. Co., Wash., 105 Pac. 625.

19.——Wrong Date of Ticket.—A passenger presenting a ticket with an erroneous date cannot enhance his damages by resisting the conductor's order to leave the train, nor because of force used in ejecting him.—Arnold v. Atchison, T. & S. F. Ry. Co., Kan., 105 Pac. 541.

20. **Common Law**—Adoption.—Under the statute of 1868 the common law remains in force in the state only so far as not modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people.—Cooper v. Seaverns, Kan., 105 Pac. 509.

21. **Constitutional Law**—Governmental Powers.—The creation of reclamation districts held solely within the discretion of the Legislature, which can neither be compelled, enjoined, or controlled.—Inglin v. Hoppin, Cal., 105 Pac. 582.

22.——State Regulation of Railroads.—Kirby's Dig., secs. 6634, 6636, imposing different penalties on railroad companies and their agents for failure to provide waiting rooms with wholesome drinking water, was not unconstitutional as depriving railroad companies of the equal protection of the laws.—State v. St. Louis & S. F. R. Co., Ark., 122 S. W. 627.

23. **Contracts**—Additional Stipulations.—That additional stipulations styled a "rider attached to and forming a part of" the contract referred to by its date form a part of the contract is conclusively shown by the rider itself, and it is as much subject to the provisions of the contract as any other part.—Barton v. Travelers' Ins. Co., S. C., 66 S. E. 118.

24.——Consideration.—Where a widow repudiated a contract to permit defendants to use certain land so long as they should support her, defendants, having had the use of the land prior to the repudiation, could not claim the value of their services.—Glass v. Hampton, Ky., 122 S. W. 803.

25.——Destruction of Subject Matter.—A contract calling for the rendition of personal service by one is subject to the implied condition that, in the event of his death, further performance on both sides will be excused.—Levy v. Caledonian Ins. Co., Cal., 105 Pac. 598.

26.——Time of Payment.—Contract for courthouse made in August, with due provision for payment thereunder, held not rendered illegal because the work was not required to be completed and final payment made prior to April 1st of the following year.—Pilcher v. English, Ga., 66 S. E. 163.

27.——Validity.—A contract for the sale of pianos for resale to the public by the buyer under a word contest held not invalid as contrary to public policy.—D. H. Baldwin & Co. v. Moser, Iowa, 123 N. W. 989.

28.——Validity.—A contract between the Governor and the beneficiary under an appropriation bill, by which the Governor approved and signed the bill on the beneficiary agreeing to accept a less amount in full satisfaction, is void as against public policy.—Lukens v. Nye, Cal., 105 Pac. 593.

29. **Corporations**—Appointment of Receiver.—Upon an application for appointment of receiver of a foreign corporation, where its title to the property is attacked, held error to refuse to consider its answer on the ground that it had failed to comply with the foreign corporation law.—Idaho Fruit Land Co. v. Great Western Beet Sugar Co., Idaho, 105 Pac. 569.

30.——Liability of Corporate Officers.—Officers of corporations are not individually liable to the corporation creditors because the capital stock was not fully subscribed, unless made so by the express terms of the statute under which it was organized.—American Radiator Co. v. Kinnear, Wash., 105 Pac. 630.

31.——Officers.—The failure of a secretary of a corporation to properly keep the minutes held not ground for appointing a receiver, especially in the absence of any suggestion of loss having resulted therefrom.—Semple v. Frisco Land Co., La., 50 So. 619.

32.——Receivers.—The receiver of a corporation appointed to preserve its property pending litigation is not authorized to pay debts which accrued before his appointment, and outstanding contracts of the corporation cannot be enforced against the receiver unless he adopts them.—Fountain v. Stickney, Iowa, 123 N. W. 947.

33.——Ultra Vires Acts.—If a sale of a minor's land to a corporation upon petition by the guardian was otherwise valid, and the minors have received the consideration of the sale, they cannot assert want of power in the corporation to take and hold the land as a ground for vacating the sale.—Ancell v. Southern Illinois & M. Bridge Co., Mo., 122 S. W. 709.

38. **Criminal Law**—Failure of Accused to Testify.—Under Code Cr. Proc. 1895, art. 770, held, that it was reversible error to ask defendant whether he testified on a former trial.—Brown v. State, Tex., 122 S. W. 565.

39.——Opinion Evidence.—One may be qualified by study without practice, or by practice without study, to give an opinion on a medical question.—Copeland v. State, Fla., 50 So. 621.

40. **Criminal Trial**—Discharge of Jury.—The discharge of the jury in a capital case for illness of the judge held a discharge from necessity, so that accused was not placed in jeopardy.—State v. Vernado, La., 50 So. 661.

41.——Former Jeopardy.—In a criminal case, held that jeopardy did not attach under Const. art. 1, sec. 13, where the jury was discharged under Pen. Code, sec. 1140.—People v. Disperati, Cal., 105 Pac. 617.

42.——Improper Argument.—Remarks of the district Attorney, in the prosecution of a negro for shooting a white man with intent to kill, held appeals to race prejudice, and reversible error.—Harris v. State, Miss., 50 So. 626.

43.——Misconduct of Jury.—Jurors speak through their verdict, and cannot violate secrets of the jury room and tell of partiality or misconduct that transpired there, nor speak of methods which induced to produce the verdict.—State v. Linn, Mo., 122 S. W. 679.

44.——Petition for New Trial.—That members of a traverse jury which convicted defendant asked the court to grant a new trial was no ground therefor.—Corbitt v. State, Ga., 66 S. E. 152.

45.——Witnesses.—Where accused was a witness in his own behalf, the court erred in charging that in general a witness who is interested will not be as honest, candid and fair as one who is not.—Holmes v. State, Neb., 123 N. W. 1043.

46. **Crops**—Contracts.—Party furnishing seed wheat for a fourth of the crop held to have a right thereto superior to a mortgage given by the other party on the entire crop.—Dodson v. Covey, Kan., 105 Pac. 519.

47. **Damages**—Warning Against Sympathy.—In an action for personal injuries to plaintiff,

and for the death of his wife and three children from an explosion of illuminating oil, held that the jury should have been cautioned not to allow questions of sympathy or sentiment to enter into their deliberations.—Chapman v. Pfarr, Iowa, 123 N. W. 992.

48. **Death**—Separate Actions.—On the wrongful death of a person, two causes of action arise—one for the benefit of the estate and the other for the next of kin.—Murphy v. St. Louis, I. M. & S. R. Co., Ark., 122 S. W. 636.

49. **Descent and Distribution**—Death of Ward.—On the death of a ward, an action against the guardian for an accounting must be brought by the ward's legal representatives and not by his heirs.—Miller v. Ash, Cal., 105 Pac. 600.

50. **Dismissal and Nonsuit**—Voluntary Nonsuit.—A contention that plaintiff should have been allowed to take a nonsuit is without merit, where he had ample time to do so before final judgment against him, but made no request therefor.—Offenstein v. Gehner, Mo., 122 S. W. 715.

51. **Dower**—Assignment.—Where a contract giving an option to purchase realty was assigned before acceptance, it was not necessary that the purchaser's wife should join therein.—Fletcher v. Painter, Kan., 105 Pac. 500.

52.——Specific Property.—A widow's dower is to be carved out of the specific property of which her husband was possessed, and not out of the proceeds of its sale.—Johnson v. Johnson, Ark., 122 S. W. 656.

53. **Easements**—Ways of Necessity.—Where there was no outlet to the public highway from land sold, the law implied a grant of a reasonable right of way from the remainder of the vendor's land to the vendee, and subsequent grantees of the vendor took subject to such right of way.—Roland v. O'Neal, Ky., 122 S. W. 827.

54. **Eminent Domain**—Homestead Right of Minors.—The homestead right of a minor in land can be taken by eminent domain.—Ancell v. Southern Illinois & Mo. Bridge Co., Mo., 122 S. W. 709.

55.——Power to Take Property.—Though a corporation is organized to engage in private business in addition to its purpose to construct and operate railroads, it may exercise the power of eminent domain.—State v. Superior Court, Wash., 105 Pac. 637.

56.——Proceedings to Widen Street.—If a public easement already exists in land to be taken to widen a street, no damages should be allowed for its present exercise, but, to so reduce a claim, the easement must have arisen in some recognized manner, and be established by proper testimony.—City of New Bern v. Wadsworth, N. C., 66 S. E. 144.

57. **Equity**—Laches.—A party possessed of information of extraneous facts and circumstances sufficient to put him, as a prudent person, on inquiry, is charged with constructive notice of all that he might have learned by an inquiry prosecuted with diligence as affecting a plea of laches.—Miller v. Ash, Cal., 105 Pac. 600.

58.——Mistake.—"Ignorantia juris non excusat" has no application where under a mutual mistake one party purchases from another property which he already owns.—Houston v. Northern Pac. Ry. Co., Minn., 123 N. W. 922.

59. **Estoppel**—Acquiescence.—A grantee who had accepted a draft as full payment for land conveyed to him by one whose title was defective by reason of a prior recorded but not properly acknowledged deed held not entitled to repudiate the payment, and to reassert his claim to the land.—Abernathy v. Pickett, Tex., 122 S. W. 579.

60.——Matters Precluded.—Where a partner holding title to land treated it during his lifetime as partnership property his heirs would be estopped from claiming title thereto through him.—Johnson v. Hogan, Mich., 123 N. W. 891.

61. **Execution**—Purchase by Judgment Creditor.—Where land is bought at execution sale by the judgment creditor, held, that he is presumed not to have paid cash, but to have credited his bid on the judgment—Lightfoot v. Horst, Tex., 122 S. W. 606.

62. **Executors and Administrators**—Assets.—An undivided interest in a paid-up policy on the life of another held to be an asset of the beneficiary's estate after insured's death, and payment by insurer, although the beneficiary died before insured.—In re Ulrici's Estate, Mo., 122 S. W. 761.

63. **Exchange**—Property in Seat.—An assignee of a seat in a stock exchange in an assignment to secure a debt due from the owner held not entitled to sue the exchange, or its president for the debt.—Shannon v. Cheney, Cal., 105 Pac. 588.

64. **Executors and Administrators**—Sale of Real Estate.—A deed by one of the three executors on whom had been conferred the power to sell, could not be upheld because the other two took no active part in administration.—Weeks v. Hosch Lumber Co., Ga., 66 S. E. 168.

65. **Explosives**—Negligent Sale.—Whether a seller of Coca-Cola bottled by him was negligent, and hence liable for an explosion of a bottle held for the jury.—Dail v. Taylor, N. C., 66 S. E. 135.

66. **False Pretenses**—Statutory Provisions.—Rev. St. 1899, sec. 2213 (Ann. St. 1906, p. 1410), held directed against obtaining money or property from one whose confidence has first been secured by fraudulent representations in connection with acts done with intent to defraud, and to be intended to reach offenders known as "confidence men."—State v. Wilson, Mo., 122 S. W. 701.

67. **Fixtures**—Intent in Making Annexation.—In ascertaining the intention to make machinery or other articles permanently a part of a factory building, adaptability to the work or business is important, and if necessary thereto, or to the purpose for which the building was designed and used, or a convenient accessory, or commonly employed, intention to annex permanently may be inferred.—Banner Iron Works v. Aetna Iron Works, Mo., 122 S. W. 762.

68. **Forgery**—Elements of Offense.—Under Code Cr. Proc. 1895, art 225, held, that one passing a forged check in Texas may be prosecuted there, even if the forgery were committed beyond the state, where the bank on which it was purported to be drawn is situated.—Batte v. State, Tex., 122 S. W 561.

69. **Frauds, Statute of**—Pleading.—Acceptance and receipt of chattels satisfying the statute of frauds will not be invalidated by a subsequent return which the seller does not consent to as a rescission.—McMillan v. Heaps, Neb., 123 N. W. 1041.

70.——Receipt of Chattels.—Acceptance and receipt of chattels satisfying the statute of frauds will not be invalidated by a subsequent return which the seller does not consent to as a rescission.—McMillan v. Heaps, Neb., 123 N. W. 1041.

71. **Gifts**—Construction.—Donation of lot to town for establishment of public held properly revoked for nonperformance of obligations imposed on donee.—Voinche v. Town of Marksville, La., 50 So. 662.

72. **Guardian and Ward**—Custody of Ward's Estate.—The court may by a general order authorize a guardian to invest his ward's money in land to be selected in his discretion.—In re Wisner's Estate, Iowa, 123 N. W. 978.

73.——Setting Aside Sale of Ward's Land.—A sale of a ward's land will not be declared invalid because the appraisers could not remem-

ber years afterward, upon testifying in proceedings to set aside the sale, of having appraised the land.—Ancell v. Southern Illinois & M. Bridge Co., Mo., 122 S. W. 709.

74. **Homicide**—Intent.—If accused placed a child to which his sister-in-law had just given birth in an exposed position near his house, without any intent to kill it, but to hide his sister-in-law's shame and his own paternity of it until it could be carried away, he would not be guilty of assault to murder, but of some lesser degree, if of anything.—Martin v. State, Tex., 122 S. W. 553.

75. **Husband and Wife**—Community Debt.—The payment of a note representing a community debt may be enforced after the wife's death in a proceeding via executiva against the surviving husband, without making the wife's heirs parties.—Schlieder v. Boulet, La., 50 So. 617.

76.——Liability for Tort of Child.—Husband held liable for injuries to a person from a pistol shot inflicted by his wife's 12-year-old son, where the husband lived with the wife, if the wife was liable therefor, under Revisal 1908, sec. 2105.—Brittingham v. Stadiem, N. C., 66 S. E. 128.

77. **Improvements**—Repudiation of Contract.—On repudiation of a life tenant's contract to give defendants the use of property for support, defendants held entitled to a lien for the increase of the vendible value of the property because of permanent improvements.—Glass v. Hampton, Ky., 122 S. W. 803.

78. **Indemnity**—Implied Contract.—An indemnitor given reasonable notice to appear and defend against a city's liability for injuries by an obstruction in a street, held bound by a judgment against the city as to all matters necessary to establish the city's liability.—City of Grand Forks v. Paulsness, N. D., 123 N. W. 878.

79. **Insolvency**—Jurisdiction.—The court in which insolvency proceedings are pending has original jurisdiction of an action on the bond given by the debtor for the release of the property.—Interstate Trust & Banking Co. v. United States Fidelity & Guaranty Co., La., 50 So. 612.

80. **Intoxicating Liquors**—Enjoined from Selling.—One who was enjoined from selling intoxicating liquor or keeping with intent to sell the same in violation of law held guilty of violating the injunction.—Goodrich v. Wheeler, Iowa, 123 N. W. 950.

81.——Local Option.—Ky. St. 1900, sec. 255, held not liable for sale in prohibited local option territory of nonintoxicating malt liquor.—City of Bowling Green v. McMullen, Ky., 122 S. W. 823.

82.——Manufacture.—The manufacture of intoxicating liquor in July, 1909, held in violation of law.—Johnson v. State, Ga., 66 S. E. 148.

83.——Revocation of License.—A conviction of permitting gambling in a barroom, in violation of Act No. 176, p. 242, of 1908, § 10, had at the same time as a conviction of selling liquor to a minor in violation of section 6, held a second conviction of violation of the act, within section 8, warranting a revocation of defendant's license.—State v. Apfel, La., 50 So. 613.

84. **Judges**—Recusation.—A judge, recusing himself and appointing a judge ad hoc, retains jurisdiction to review the appointment, on suggestion that the judge ad hoc is disqualified.—State v. Woods, La., 50 So. 671.

85. **Judgment**—Collateral Attack.—A personal judgment in favor of the assignee of a note secured by mortgage pending a suit to foreclose the mortgage for a personal judgment rendered by a court having jurisdiction of the subject-matter and of the parties held not void, though erroneous.—Staples v. Shiver, Ky., 122 S. W. 826.

86.——Res Judicata.—Where A sold timber to B and C, and a judgment decreed B the owner of the timber, it was res judicata against A, repurchasing the timber from C.—Roach v. Craig, La., 50 So. 652.

87. **Judicial Sales**—Setting Aside.—Great inadequacy of price, accompanied by slight circumstances indicating unfairness, held sufficient to justify the setting aside of a judicial sale.—Roger v. Whitham, Wash., 105 Pac. 628.

88. **Replevin**—Justices of the Peace.—Where both parties to replevin before a justice fixed the value of the property at an amount within the justice's jurisdiction, a jury on appeal to the circuit court could not properly find the value at a sum greater than the highest amount alleged.—People's Sec. Bank of Worthing v. Sanderson, S. D., 123 N. W. 873.

89. **Landlord and Tenant**—Repairs to Building.—Tenant held entitled to recover cost of repairs to building caused by breaking of plate glass window by burglars.—Weil v. Bonart, La., 50 So. 655.

90.——Tenancy From Month to Month.—A tenant from month to month held not entitled to possession and to recover damages for an eviction after termination of his lease by default in rent.—Wilson v. Moore, Tex., 122 S. W. 577.

91. **Libel and Slander**—Words Not Imputing Unchastity.—Spoken words, imputing unchastity to a female, are actionable without allegation or proof of special damages.—Cooper v. Seaverns, Kan., 105 Pac. 509.

92. **Life Insurance**—Vested Interest.—One having an undivided interest in a paid-up policy on the life of another held to possess a vested interest.—In re Ulrich's Estate, Mo., 122 S. W. 761.

93. **Limitation of Action**—Part Payment.—Part payment made by an agent of the debtor tolls the statute of limitations as effectually as payment by the debtor.—McAbee v. Wiley, Ark., 122 S. W. 623.

94. **Mandamus**—Acts Subject to Review.—The superior court held authorized on mandamus to compel the board of supervisors of a county to establish a reclamation district, where the undisputed facts prove all the matters required by Pol. Code, sec. 3446 et seq.—Inglin v. Hoppin, Cal., 105 Pac. 582.

95.——Adequate Other Remedy.—The more adequate and speedy remedy which a suitor must possss to defeat his right to mandamus is a legal, rather than a physical, remedy.—State v. Holmes, N. D., 123 N. W. 884.

96. **Master and Servant**—Fellow Servant.—That a rule forbidding switchmen to mount footboards of moving engine had been disregarded may be shown under issue of contributory negligence.—Berglund v. Illinois Cent. R. Co., Minn., 123 N. W. 928.

97.——Injuries to Servant.—An employer held not liable for injuries to a workman struck by a hammer flying off the handle.—Dunn v. Southern Ry. Co., N. C., 66 S. E. 134.

98.——Method of Work.—While it was the duty of a switch crew to know on what track they were moving an engine and car at night, they might transfer the car from one part of the yards to another on any track they might select if it was safe for that purpose.—Yeager v. Chicago, R. I. & P. Ry. Co., Iowa, 123 N. W. 974.

99.——Negligence.—The general rule against the recovery for injuries sustained by persons while attempting to get on or off a moving train held not to apply with absolute strictness to "train hands," brakemen, and the like.—Reeves v. North Carolina R. Co., N. C., 66 S. E. 133.

100.——Protection of Employees.—Acts 28th Leg. p. 178, c 112, sec. 1, approved April 3, 1903, requiring electric railways to provide appliances to protect motormen from the weather, held valid as a police regulation if otherwise valid.—Beaumont Traction Co. v. State, Tex., 122 S. W. 615.

101.——Safe Place to Work.—A servant held authorized to assume that his master or servants employed to do repair work had protected a hole in the floor made by the servants while doing the repair work.—Shives v. Eno Cotton Mills, N. C., 66 S. E. 133.

102.——Assumption of Risk.—Where two employees are working together in the performance of a common task, and the inferior servant is injured by the negligence of the superior in the performance of an act incident to the common employment, the master is not liable as the risk ordinarily incident to the employment

was assumed.—English v. Roberts, Johnson & Rand Shoe Co., Mo., 122 S. W. 747.

103.——Federal Employers' Liability Act.—The federal employer's liability act is constitutional.—Walsh v. New York, N. H. & H. R. Co., U. S. C. C., D. Mass., 173 Fed. 494.

104. **Mortgages**—Foreclosure.—The rule that a debtor making voluntary payments may specify upon which debt they shall be applied does not apply to the application of the proceeds of sale of mortgaged property.—Bank of Defiance v. Ryan, Iowa, 123 N. W. 940.

105.——Sale Under Trust Deeds.—Upon a foreclosure sale under a junior trust deed as between senior lienors and the junior mortgagor, the mortgagor is entitled to the surplus, unless he had relinquished as against the senior lienors.—Jones v. Sheppard, Mo., 122 S. W. 764.

106. **Municipal Corporations**—Invalid Contract.—A taxpayer has a right to enjoin a paving contract, adjudicated without opportunity for competition, unless the property holders fix the price for a patented pavement.—Saxon v. City of New Orleans, La., 50 So. 663.

107.——Obstruction.—A city board of aldermen held to have no power to permit the obstruction of a sidewalk, so that such permission would be void, and would not protect one receiving it in an action to enjoin the obstruction.—Caldwell v. George, Miss., 50 So. 631.

108. **Negligence**—Contributory Negligence.—Children of tender age are not held to the same accountability as persons of full age, but must exercise such care as persons of their age and intelligence ordinarily exercise.—Sifert v. Schaible, Kan., 105 Pac. 529.

109.——Crossing Accident.—If both plaintiff and defendant could have prevented the accident, but neglected to do so, their negligence was concurrent, and the last chance doctrine would not apply.—Bruggeman v. Illinois Cent. R. Co., Iowa, 123 N. W. 1007.

110.——Defect in Quality.—Vendor held not liable to purchaser for injuries by petroleum sold to be used for dipping cattle, defective in one element only, which defect did not contribute to the injury.—Miller v. Raymond, Neb., 123 N. W. 1019.

111. **Officers**—Title to Office.—The holding over period of an office does not have the effect of extending the term succeeding.—State v. Hingle, La., 50 So. 616.

112. **Parent and Child**—Liability for Torts of Child.—Relationship alone does not make a parent answerable for the wrongful acts of his minor child; but it must appear that he approved such acts, or that the child was his servant or agent.—Brittingham v. Stadiem, N. C., 66 S. E. 128.

113. **Partnership**—What Constitutes.—Partners whose business it is to buy and sell cotton seed are a trading partnership.—Cotton Plant Oil Co. v. Buckeye Cotton Oil Co., Ark., 122 S. W. 658.

114. **Pawnbrokers**—Title of Pledgor.—Person acquiring merchandise with a view of selling it for the owner acquires no right to pawn the property for his own benefit, and the owner may recover it from the pledgee.—William Frantz & Co. v. J. S. Winehill & Co., La., 50 So. 650.

115. **Perjury**—What Constitutes.—A false statement as to the property owned, made by one justifying as cognizor in a criminal prosecution, is perjury, and not false swearing.—Warren v. State, Tex., 122 S. W. 541.

116. **Pleading**—Verification.—In the absence of a statute authorizing such procedure, a party may not interrogate a third person verifying the pleading of the adverse party as to the sufficiency of his knowledge of the facts alleged in the pleading.—D. H. Baldwin & Co. v. Moser, Iowa, 123 N. W. 989.

117. **Principal and Agent**—Personal Injuries.—In general when a person acts avowedly as an agent for another who is known as the principal, his acts and contracts within the scope of his authority are considered the acts and contracts of the principal, and involve no personal liability.—Roach v. Rutter, Mont., 105 Pac. 555.

118.——Right to Purchase.—Agents to lease and collect rents held to have committed no fraud in the purchase of the property of their principal, and not required to account for profits made on a resale thereof.—Douglass v. Lougee, Iowa, 123 N. W. 967.

119. **Property**—Ownership.—Where property has been obtained from the owner by a felonious act, his unqualified ownership is not changed, and he may peaceably take it in whose hands he may find it.—Russell v. Brooks, Ark., 122 S. W. 649.

120. **Public Land**—Homestead.—Under Rev. St. U. S., sec. 2291 (U. S. Comp. St. 1901, p. 1390), a homestead entryman, on making final proof, must file an affidavit that he has not directly or indirectly alienated, or agreed to alienate, said land.—Harris v. McCrary, Idaho, 105 Pac. 558.

121. **Railroads**—Duty to Stop and Listen.—One having a right to cross a railroad track need not stop to look or listen before crossing, in order to discover whether a train is approaching.—Chesapeake & O. Ry. Co. v. Patrick, Ky., 122 S. W. 820.

122. **Religious Societies**—General Council.—Action of a council, not shown to have authority, in excommunicating a pastor of a local church, held not ground for enjoining the pastor and his followers among his congregation from using the church property.—Mason v. Lee, Miss., 50 So. 625.

123. **Sales**—Executed Contract.—Where it does not appear that goods shipped were not consigned to shipper's order, nor that the buyer received the goods from the carrier, an executed contract of sale is not shown.—American Jobbing Ass'n. v. Wesson, Ark., 122 S. W. 664.

124. **Schools and School Districts**—Levying Taxes.—Taxpaying citizens of a city school district may sue to restrain the school board from levying taxes to pay interest on illegal school district bonds.—Martin v. Bennett, Mo., 122 S. W. 779.

125. **Specific Performance**—Method of Performance.—A vendor will not be allowed to agree upon a method of performance, induce the purchaser to act accordingly, and then work a gross fraud by repudiating altogether.—Fletcher v. Painter, Kan., 105 Pac. 500.

126. **Taxation**—Assessment of Property.—When property is not assessed for more than its true value, but is assessed much higher than other property, the remedy of the owner is to ask that the assessment be equalized by raising the assessment of all property to its actual value, and not by lowering the value of his own.—George C. Bagley Elevator Co. v. Butler, S. D., 123 N. W. 866.

127. **Vendor and Purchaser**—Bona Fide Purchaser.—One asserting a title resulting from the reservation of an express lien on land for the purchase price as against a grantee of the purchaser has the burden of proving that the purchaser had notice of an express lien.—Buckley v. Runge, Tex., 122 S. W. 596.

128.——Bona Fide Purchaser.—The word "trustee," following the name of a grantee in a deed, is notice sufficient to put those dealing with him concerning the property on inquiry as to the trust.—Snyder v. Collier, Neb., 123 N. W. 1023.

129. **Water and Water Courses**—Percolating Waters.—The English rule as to property rights in percolating underground waters does not obtain in New Jersey; the landowner in New Jersey being entitled only to the reasonable use thereof.—Meeker v. City of East Orange, N. J., 74 Atl. 379.

130. **Wills**—Contests.—Proof that testator was insane, and had been insane for a long period of years, held to create a presumption that he was insane at the time of the execution of the will, and the burden of establishing a lucid interval was on the party asserting it.—Buford v. Gruber, Mo., 122 S. W. 717.